

A **MOHAMAD JAMEL MUHAFIZ ZAMRI v. PP**

HIGH COURT MALAYA, KOTA BHARU
AHMAD BACHE JC
[CRIMINAL APPEAL NO: 42S-7-1-2017]
15 FEBRUARY 2018

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CRIMINAL LAW: *Corrosive and Explosive Substances and Offensive Weapons Act 1958 – Section 6(1) – Possession of weapon without lawful excuse – Weapon found on accused while committing offence of motorcycle theft – Accused sentenced to seven years imprisonment for offence of possession of weapon and one year imprisonment for offence of theft of motorcycle – Appeal against sentence for possession of weapon – Whether sentence for possession of weapon excessive – Whether sentence for possession of weapon ought to be reduced*

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CRIMINAL PROCEDURE: *Sentence – Appeal against – Offences – Possession of weapon without lawful excuse – Weapon found on accused while committing offence of motorcycle theft – Accused sentenced to seven years imprisonment for offence of possession of weapon and one year imprisonment for offence of theft of motorcycle – Whether sentence excessive and ought to be reduced – Corrosive and Explosive Substances and Offensive Weapons Act 1958, s. 6(1)*

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The accused was charged for having in his possession in a public place a sharp pointed ‘T’ weapon (‘the said weapon’), without lawful excuse or authority, an offence under s. 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 (‘the Act’). The said weapon was found on the accused upon a search which was conducted on the accused pursuant to the arrest of the accused for stealing a motorcycle. The accused was found

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Held (affirming conviction, reducing sentence from seven to five years imprisonment):

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(1) The sentence of seven years imprisonment was too harsh. However, by virtue of the social report which showed that the parents could no longer have control of the accused’s whereabouts and that of his negative/loose character, a binding over was not suitable. (para 19)

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(2) The main offence committed by the accused was the theft of the motorcycle and the possession of the said weapon was used as a tool in pursuant of committing that crime. However, the prosecution found it fit to prefer a separate charge against him for this act of him. It would be an affront to common sense that an accused person be sentenced to seven years imprisonment for a subsidiary crime when for the main crime, he was only sentenced to one year imprisonment. There was hence an ‘injustice’ which did not attract the attention of the judge. As

the minimum mandatory sentence was five years imprisonment, the judge should have considered the minimum sentence of five years. As this was not considered by the judge, an appellate intervention was warranted. (paras 22 & 23)

- (3) The accused was a ‘youthful offender’ at the time the offence was committed. As a young person, some consideration should be given, as too long in prison would do more harm than good as he would become a hardened criminal. Hence, the accused should be given the opportunity to mend himself and, thereafter, turn over a new leaf upon early release from prison. For the aforesaid reason, the accused should be given a lesser prison sentence, namely, five years, the minimum allowed under the Act. (paras 24 & 26)

Case(s) referred to:

Goh Kheng Seong v. PP [1992] 4 CLJ 2133; [1992] 2 CLJ (Rep) 408 HC (*refd*)
Jayanthan v. PP [1973] 1 LNS 56 FC (*refd*)
Kamarusham Zakaria v. PP [2018] 2 CLJ 328 HC (*refd*)
Mahrus v. PP [1991] 1 LNS 45 HC (*refd*)
Nor Afizal Azizan v. PP [2012] 6 CLJ 370 CA (*refd*)
PP v. Hassan Ali Abdul Razak [2016] 9 CLJ 584 HC (*refd*)
PP v. Leonard Glenn Francis [1989] 1 CLJ 972; [1989] 2 CLJ (Rep) 320 HC (*refd*)
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC (*refd*)
PP v. Man Ismail [1938] 1 LNS 54 HC (*refd*)
PP v. Nordin Yusmadi [1996] 2 CLJ 90 HC (*refd*)
PP v. Wahab [1964] 1 LNS 150 HC (*refd*)
PP v. Wan Hasrul Nizam Wan Hizamuddin [2017] 4 CLJ 389 HC (*refd*)
Tukiran Taib v. PP [1955] 1 LNS 166 HC (*refd*)

Legislation referred to:

Corrosive and Explosive Substances and Offensive Weapons Act 1958, s. 6(1)
 Criminal Procedure Code, s. 294(1)

For the respondent - Siti Hajar Alias; DPP

For the appellant - Hasif Hasan; M/s Hasif Kumar & Co

Reported by Sandra Gabriel

JUDGMENT

Ahmad Bache JC:

Background

[1] The accused was charged at the court below for having in his possession in a public place, a dangerous weapon, that was a sharp pointed ‘T’ weapon, without lawful excuse or authority, an offence under s. 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 (Act 357) punishable under the same section.

[2] After a full trial, the accused was found guilty and was convicted and sentenced to seven years imprisonment from the date of his arrest.

[3] Dissatisfied, the accused filed an appeal on conviction, and sentence to this court.

A [4] After hearing submissions by both parties, this court affirmed the conviction, but allowed the appeal on sentence in part by substituting the sentence by reducing the sentence from seven to five years imprisonment.

[5] Dissatisfied with the decision of this court, the Public Prosecutor filed an appeal in respect of the inadequacy of sentence to the Court of Appeal.

B [6] Herewith are the grounds for that decision.

The Charge

[7] The charge preferred against the accused was as follows:

C Bahawa kamu pada 25/5/2016 jam lebih kurang 0600 petang di alamat PT 864 Belakang Masjid Mustaqim, Kota Bharu dalam daerah Kota Bharu di dalam negeri Kelantan telah di dapati dalam milik kamu satu batang besi berbentuk "T" yang telah di ubahsuai di balut dengan salotape berwarna hitam yang mana di bahagian hujung matanya telah ditajamkan tanpa maksud yang sah atau mempunyai kebenaran yang sah dari pihak berkuasa. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 6(1)(a) Akta Bahan Kakisan Letupan Dan Senjata Berbahaya 1958.

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The Prosecution's Case Against The Accused

E [8] The prosecution's case against the accused as appreciated by the trial judge at pp. 14 to 15 of the appeal record are reproduced below in *verbatim* as follows:

F Pengadu (SP1) memaklumkan bahawa pada 25/5/2016 lebih kurang jam 6 petang bersama Lans Koperat Fauzi yang sedang membuat rondaan URV telah menerima maklumat dari Gerakan IPD Kota Bharu mengatakan ada tangkapan orang awam mengenai kecurian motosikal di alamat PT 864 Belakang Masjid Mustaqim Kubang Kerian Kota Bharu.

G Pengadu bersama Lans Koperat Fauzi pergi ke tempat kejadian dan mendapati orang awam (Ishak bin Hamat) telah menangkap seorang lelaki Melayu kerana mencuri motosikal nombor pendaftaran DCH 1194.

G Kemudiannya, pengadu membuat pemeriksaan tubuh badan OKT dan menjumpai satu batang besi berbentuk T yang dibalut dengan selotape warna hitam yang mana hujungnya telah di tajamkan di dalam poket seluar bahagian hadapan sebelah kanan seluar Jeans jenama Guess berwarna biru lusuh yang di pakai oleh OKT.

H OKT telah dicamkan sebagai Mohd Jamel Muhafiz bin Zamri oleh pengadu.

I Saksi seterusnya ialah Pegawai Penyiasat (SP3) memaklumkan kejadian adalah di sebuah rumah yang berdekatan dengan masjid.

I SP3 juga memaklumkan bahawa bagi kesalahan mencuri, OKT telah di hukum dengan setahun pemenjaraan di bawah seksyen 379A setelah mengaku salah.

The Finding Of The Sessions Judge

[9] The Sessions Judge in sentencing the accused to seven years imprisonment from the date of his arrest *inter alia* said at pp. 33 and 34 of the appeal records as follows:

Selain itu juga, hukuman yang di kenakan ini boleh dan mampu memberikan pencegahan kepada bakal-bakal pesalah yang lain.

Untuk itu, punca rujukan saya akan prinsip hukuman ini adalah kepada kes *Ong Lai Kim & Ors. v. Public Prosecutor* [1991] 3 CLJ Rep 376 Zakaria Yatim H (pada ketika itu) menyatakan:

The punishment must not only deter the appellants from committing a similar offence in the future but it must also deter others from committing such an offence. The punishment inflicted for grave offences including the crime of rape should adequately reflect the revulsion felt by the great majority of society. See J.C. Smith & B. Hogan, *Criminal Law*, 5th Edn., p. 6.

Saya juga mengambilkira OKT telah dihukum di bawah seksyen 379A Kanun Keseksaan selama setahun.

Saya percaya hukuman bagi kesalahan kali kedua ini terhadap OKT, dapat menyampaikan mesej yang sewajarnya kepada masyarakat tentang kesedaran kesalahan sebegini serta menginsafkan OKT akan jenayah yang OKT telah lakukan.

Dengan mengambil kira satu perbicaraan penuh telah berjalan dan faktor-faktor di atas, saya telah menjatuhkan hukuman pemenjaraan tujuh tahun bermula dari tarikh tangkap.

Analysis And Findings Of This Court

[10] It is to be noted that this section (s. 6) was quite recently amended which amendment came into force effective 2 July 2014. Prior to that amendment, offenders were charged only in the Magistrate's Courts and it was not uncommon for offenders to be given a one-day imprisonment or a bound over only as the maximum sentence allowed then was an imprisonment not exceeding two years and to whipping.

[11] To appreciate the old and the new amended provision, this court found it germane to distinguish them:

The previous provision reads:

6(1) Any person who in any public road or place carries or has in his possession or under his control any offensive weapon otherwise than with lawful authority or for a lawful purpose shall be guilty of an offence and on conviction be liable to imprisonment for a term not exceeding two years, and to whipping.

Whereas the amended provision reads:

6(1) Any person who in any public road or place carries or has in his possession or under his control any offensive weapon otherwise than with lawful authority or for a lawful purpose shall be guilty of an offence and on conviction be liable to imprisonment for a term of not less than five years and not more than ten years, and to whipping.

- A [12] The amended provision, is worded “shall be liable”, similar to the previous provision. The terms “shall be punished” and “be liable to be punished” were subjected to much judicial discussions. (see *PP v. Wahab* [1964] 1 LNS 150; [1964] 1 MLJ 265; *Jayanathan v. PP* [1973] 1 LNS 56; [1973] 2 MLJ 68; *Mahrus v. PP* [1991] 1 LNS 45; [1992] 1 MLJ 561;
- B *Goh Kheng Seong v. PP* [1992] 4 CLJ 2133; [1992] 2 CLJ (Rep) 408; [1993] 1 MLJ 103; *PP v. Man bin Ismail* [1938] 1 LNS 54; [1939] 1 MLJ 207; *PP v. Nordin Yusmadi* [1996] 2 CLJ 90; *PP v. Leonard Glenn Francis* [1989] 1 CLJ 972; [1989] 2 CLJ (Rep) 320; [1989] 2 MLJ 158.
- C [13] However, the Court of Appeal in the case of *PP v. Hassan Ali* (unreported) (*infra*) had decided that the amended provision carries a meaning of mandatory five years minimum imprisonment with a maximum of ten years imprisonment.
- D [14] That begs the next question as to whether by virtue of the amended provision, can a bound over or bond of good behaviour under s. 294 of the Criminal Procedure Code be imposed?
- [15] This court had occasion to analyse on this matter in the case of *Kamarusham Zakaria v. PP* [2018] 2 CLJ 328 where this court had referred to the Hansard and said at pp. 333 and 334.
- E At page 81 of the Hansard dated 10/4/2014 it is stated:
- Pertama, Yang Berhormat menyebut persoalan hukuman yang kita letak di sini sebagai mempunyai minimum sentence dan tidak boleh dihukum kurang daripada itu dan maksimumnya memang kita tahu. Semua yang mempunyai latihan sebagai peguam Yang Berhormat, bila melihat perkara ini berlaku kita berasa bimbang
- F kerana tidak ada memberi laluan budi bicara kepada pihak hakim semasa menjalankan kes itu di mahkamah. Akan tetapi biarlah saya mula dengan sedikit mukadimah.
- Sebenarnya walaupun dalam undang-undang ini mengatakan bahawa minimum sentence itu berapa tahun dan maksimumnya berapa tahun. *Maknanya kalau dia didapati bersalah di bawah undang-undang ini, hukuman yang bakal hakim beri kepada dia ialah minimum*
- G *tetapi dalam masa yang sama Tuan Pengerusi, kuasa mahkamah dalam mengenakan hukuman kepada pesalah, dalam sudut lain tidak pernah diambil. Umpamanya di bawah seksyen 294 Kanun Tatacara Jenayah yang mana mahkamah boleh memberi bon berkelakuan*
- H *baik, sama tempoh yang ditetapkan oleh mahkamah.* (tekanan ditambah)
- I Hence, it is patently clear that the intention of the Parliament is to enable a person convicted under this provision to be permitted to be released on bond for good behavior, according to the satisfaction of the court. This was also affirmed in the case of *PP v Hassan Ali* (*supra*), where the Court of Appeal had affirmed the order of bound over under section 294 CPC handed down by the High Court.

Back to the instant case, this court would like to reiterate that the amendment was to curb the rising number of organised serious crimes such as using firearms and dangerous weapons in robbery, murder, extortion, gangland fights etc. although such elements were not borne out from the facts of this case.

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[16] The order of bound-over did not at all exonerate an accused person of the offence committed as he was still convicted but only that the sentence was suspended and the conviction recorded and will form part of his criminal record (see *Kamarusham Zakaria (supra)*, *Nor Afizal Azizan v. PP* [2012] 6 CLJ 370).

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[17] Hence it is not uncommon for courts in Malaysia including the Court of Appeal, depending on the facts and circumstances of each case to give an order of bound-over for this offence. As an example, in the case of *PP v. Hassan Ali Abdul Razak* [2016] 9 CLJ 584, the High Court gave an order of bound over under s. 294 of the CPC and was affirmed by the Court of Appeal. Likewise in the case of *PP v. Wan Hasrul Nizam Wan Hizamuddin* [2017] 4 CLJ 389, the Sessions Court ordered a bound-over under s. 294(1) of the CPC. On appeal by the Public Prosecutor, the High Court dismissed the appeal and affirmed the order of bound-over.

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[18] From the line of authorities adverted to earlier, a bound-over order seems to be the trend of sentencing adopted by the courts, depending on the facts and circumstances of each case.

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[19] Back to the instant case, the accused was sentenced to seven years imprisonment. This court had perused the grounds of judgment of the learned Sessions Judge and found it germane to interfere. This court found on analysis, the sentence of seven years imprisonment was too harsh and crushing in the circumstances of the case. However, this court by virtue of the social report (P9) which showed that the parents can no longer have control of the accused's whereabouts and that of his negative/loose character, agreed that a bound-over is not suitable.

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[20] The amendment to the provision as alluded to earlier was to curb the increasing number of serious organised crime, such as gang robbery, use of firearms, gang fight, gangland murder etc, as mentioned in the Hansard.

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[21] This court had occasion to describe the scenario if at all the weapon/s were meant for such organised crime in the case of *Kamarusham (supra)* thus:

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There were no such scenario as samurai swords found in the boot of the car he was assumed driving with few others inside, which could signify that he and the rest had just come back from a gang fight; or a blood stained parang, or long knife found on him, which could all be inferred that the accused had stabbed someone after a fight or a robbery etc.

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A [22] Reverting back to the case at hand, there were also no such scenarios as described above. The accused was merely found having in his possession the ‘T-weapon’ which looks like a sharp-edged screwdriver whilst stealing the motorcycle with which he had already pleaded guilty and sentenced to 12 months imprisonment. In fact, this court was of the considered opinion that from the evidence adduced, the main offence committed by the accused was the theft of the motorcycle and that the said ‘T’ weapon was used as a tool in pursuant of committing that crime.

B [23] However, the prosecution found it fit to prefer a separate charge against him for this act of him. Indeed, with respect, it will be an affront to common sense that an accused person be sentenced to seven years imprisonment for a subsidiary crime when for the main crime, he was only sentenced to one year imprisonment. There was hence an “injustice” which did not attract the attention of the learned judge. As the minimum mandatory sentence was five years imprisonment, to correct the “injustice”, whilst this court agreed that in the circumstances of the case, a bound-over was not suitable, the learned judge should have considered the minimum sentence of five years. As this was not considered by the learned judge, an appellate intervention was warranted.

C [24] Further, the accused was a “youthful offender” at the time this offence was committed. As a young person, some consideration should be given, (see *Tukiran Taib v. PP* [1955] 1 LNS 166; [1955] MLJ 24) as too long in prison will do more harm than good as he would become a hardened criminal. Hence he should be given the opportunity to mend himself and thereafter turn over a new leaf upon early release from prison. Further, public interest which was of paramount importance itself warrants that the sentence to be imposed on this type of criminal should be one that could induce him to turn from a criminal to an honest life. In the words of Hashim Yeop Sani J as he then was in the case of *PP v. Loo Choon Fatt* [1976] 1 LNS 102 who said:

D The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living.

E [25] Unfortunately, the learned judge did not give significant consideration on this matter which warranted appellate intervention.

Conclusion

F [26] For the aforesaid reason, this court found that in the circumstances of the case, the accused should be given a lesser prison sentence. As the mandatory minimum sentence is five years, this court ordered that the sentence be reduced to five years, the minimum allowed under the section. In the upshot, the appeal by the accused/appellant was allowed and the order of the Sessions Judge was accordingly set aside.

I Order accordingly.
